No. 92-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., AND UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS, AND THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BUSINESS AIRCRAFT ASSOCIATION, INC., NATIONAL AIR TRANSPORTATION ASSOCIATION, INC. AND HELICOPTER ASSOCIATION INTERNATIONAL, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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This brief is submitted in support of the position of Respondents on the questions presented.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE AMICI CURIAE

The National Business Aircraft Association ("NBAA") is a non-profit corporation incorporated and based in Washington, D.C. NBAA represents business aviation before government agencies and the U.S. Congress and, in selected cases of importance, represents its members' interests by initiating or participating in court actions.

NBAA has approximately 3,200 member companies flying more than 5,200 general aviation aircraft.[2] Other members are companies which derive fifty percent or more of their revenues from business aviation (such as certain business aircraft manufacturers and fixed-base operators). NBAA members operate aircraft to and from the Kent County International Airport (the "Airport").

The National Air Transportation Association ("NATA") is a Maryland non-profit corporation based in Alexandria, Virginia. NATA represents the business interests of aviation companies on legislative and regulatory matters at the federal level.

NATA was created in 1940 and has nearly 2,000 members, primarily small businesses. NATA members provide fuel and line services, on-demand air charters, aircraft sales, flight training, maintenance, avionics, instruments, and other technical services. NATA members include both general aviation aircraft operators and companies which provide equipment and services to such operators and to commercial airlines as well. The three fixed-base operators at the Airport are NATA members.

The Helicopter Association International ("HAI") is a Delaware non-profit corporation based in Alexandria, Virginia. HAI was founded in 1948 and has over 1300 member companies, primarily small businesses. HAI's objectives are to increase safety in all aspects of civil helicopter activities and public acceptance of helicopters as safe, economic and practical vehicles.

HAI's regular members operate civil helicopters in commercial, corporate and public service. Collectively, these members operate 4,000 civil helicopters and fly more than 2,000,000 hours annually. HAI's associate members manufacture helicopters, engines and components, and service, repair, sell, finance, insure, and otherwise support the civil helicopter industry. HAI members operate helicopters to and from the Airport.

[2] "General aviation aircraft are corporate aircraft and privately-owned aircraft that are not in commercial, passenger, cargo or military service." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1114 (W.D. Mich. 1990).

SUMMARY OF ARGUMENT

Petitioners argue that, as a matter of law, general aviation at the Airport must be charged 100% of its allocated costs, *i.e.*, the general aviation fees at the Airport must be increased more than fivefold.[3] Petitioners argue that this is the necessary and logical result of the Commerce Clause and the Anti-Head Tax Act, 49 U.S.C. App. § 1513 (the "AHTA"). NBAA, NATA and HAI, to the contrary, submit that neither the Commerce Clause nor the AHTA require that airline and general aviation fees be homogenized and that the fee schedule at the Airport is lawful and rational.

1. The AHTA is a single purpose statute which does not explicitly or implicitly serve as a proxy for the Commerce Clause. Either airlines or general aviation can invoke the AHTA to attack user charges on their passenger operations to the extent that such charges are disguised head taxes, *i.e.*, to the extent that such charges are too high with respect to their allocated costs or produce revenues which will be diverted away from airport uses.

[3] The District Court found that the fees assessed general aviation (a $.04 per gallon fuel flowage fee and a landing fee for itinerant aircraft) brought in revenues of less than $125,000 per year compared to costs of $650,000 allocated to general aviation. *Northwest Airlines*, 738 F. Supp. at 1116.

Neither the airlines nor general aviation can invoke the AHTA to attack the user charges assessed against each other or against other airport users.

2. Even if the application of the Commerce Clause is not foreclosed by the AHTA - and NBAA, NATA and HAI take no position in that regard - there is no basis for mandating an increase in general aviation fees on constitutional grounds. There is nothing in the record which indicates that those fees represent unreasonable discrimination in favor of intrastate commerce. General aviation at the Airport does not compete with the airlines for passengers and is not, in any event, predominately intrastate in nature. Moreover, there are rational explanations for the different measure and level of general aviation fees which do not implicate any intent to burden the airlines.

ARGUMENT

I. THE ANTI-HEAD TAX ACT IS NOT A PROXY FOR THE COMMERCE CLAUSE AND CANNOT BE USED TO HOMOGENIZE THE CHARGES IMPOSED ON VARIOUS CLASSES OF AIRPORT USERS.

The AHTA addressed a specific problem: in the judgment of Congress, the *per capita* fees imposed by certain airports upon passengers departing on commercial airlines, although allowed by *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines, Inc.*, 405 U.S. 707 (1972), were too high. By raising the cost of air travel, "this added cost could make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets." S. Rep. No. 12, 93d Cong., 1st Sess. *reprinted in* 1973 U.S.C.C.A.N. 1434, 1451. There also was a concern that "if head taxes are to be used for non-aviation purposes, or

for programs which don't benefit the airport system where it is collected, such taxes are not equitable." *Id.*

The AHTA resolved this problem by prohibiting the imposition of all direct and indirect local head taxes on passengers carried by general aviation in "air commerce" and by airlines in "air transportation."[4] 49 U.S.C. App. § 1513(a). Since a blanket prohibition against local airport charges could prohibit airport authorities from collecting traditional user charges, a provision was added excluding from this prohibition "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. § 1513(b).

To the extent that the AHTA addresses any form of local airport charge other than a head tax, it requires only that such a charge be "reasonable." In the context of the statute, a user charge which is not "reasonable" can only mean a charge on the carriage of passengers[5] which is a head tax in disguise, *i.e.*, a charge which is too high in relation to allocated costs or is

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[4] The AHTA was enacted as Section 1113 of the Federal Aviation Act of 1958. 49 U.S.C. App. § 1513. The definitional scheme of the Federal Aviation Act provides, first, for "air commerce," defined in pertinent part as the carriage of passengers or property by aircraft for compensation or hire, or the operation of aircraft in the conduct or furtherance of a business or vocation, or the operation of aircraft within any federal airway, or any other operation of aircraft which directly affects, or which may endanger safety in, interstate, overseas or foreign air commerce. 49 U.S.C. App. §§ 1301(4) and 1301(23). This is a definition which encompasses all non-military aircraft operations within the U.S., and it is the basis for, *inter alia*, the regulation of general aviation operations. *See* 14 C.F.R. Part 91. The term "air transportation" is more narrowly drawn, encompassing carriage for transportation or hire as a common carrier. 49 U.S.C. App. §§ 1301(10) and 1301(24). This is the term which describes the commercial airlines.

[5] It is possible that some of the general aviation and airline operations at the Airport are cargo flights. Such operations are plainly outside the AHTA. However, there is nothing in the record speaking to this distinction.

intended to produce revenues for other than airport uses. If a charge does not have either feature, it is *per se* "reasonable" under the AHTA.

Petitioners nonetheless argue that the term "reasonable" imports into the AHTA a Commerce Clause analysis which includes considerations of discrimination vis-à-vis each class of airport user. Under this argument, even if a particular airport user charge is not so high relative to the appropriate costs as to create a disguised head tax, it may be "unreasonable" under the AHTA if it is too high relative to charges assessed other users.

There is no support for this argument either in the text of the statute or its legislative history. The AHTA banned charges allowed by the Court's decision in *Evansville*. It did not, either expressly or implicitly, adopt the Court's Commerce Clause analysis in that case as the standard to be applied in excepting normal user charges from the head tax prohibition. The term "reasonable" is a limitation on an exception, not a broad mandate to control all user charges imposed by airports.

Petitioners' argument is also inconsistent with the ultimate relief they seek (or should be seeking) - a lowering of the fees assessed the airlines. If the AHTA requires the airline and general aviation fees to be homogenized, raising the general aviation fees fivefold will not lower by one cent the costs, and thereby the fees, allocated to the airlines. Petitioners strain to close this gap by asserting that the AHTA also prohibits the Airport from maximizing revenues received from concessionaires, *i.e.*, concession revenues must be used to cross-subsidize the airlines, and that if concession revenues are held steady while general aviation fees are increased, there will be more money in the pool[6] to apply against the airline's costs. The

[6] Although Petitioners argue for a pooling of all airport revenues for the benefit of the airlines, they do not suggest that the AHTA requires airports to use the alternative residual cost methodology for assessing charges, a methodology which pools the risks as well as the rewards of an airport operation. *See Northwest Airlines*, 738 F. Supp. at 1114.

contingencies aside, this reads a set of federal policy guidelines into the AHTA which are nowhere apparent on the its face or in its history.

II. THE CHARGES ASSESSED ON GENERAL AVIATION ARE *PRIMA FACIE* REASONABLE. THERE IS NO EVIDENCE THAT GENERAL AVIATION AT GRAND RAPIDS COMPETES WITH THE AIRLINES OR THAT IT IS INTRASTATE IN NATURE. THERE ALSO ARE RATIONAL EXPLANATIONS FOR THE CHARGES OTHER THAN AN INTENT TO DISADVANTAGE THE AIRLINES.

Contrary to Petitioners' assertion, the Airport fee schedule is not discriminatory on its face. Under a Commerce Clause analysis, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978).[7] A claim of facial discrimination requires a showing, at a minimum, that (i) the alleged beneficiary of the discrimination is a class of intrastate companies (ii) which competes with the allegedly burdened class of interstate companies[8] and (iii) the discrimination cannot be explained by "a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S.Ct. at 800. Not one of these prerequisites is present in this case.

1. Petitioners ask the Court to assume that general aviation operations at the Airport are predominately intrastate in nature.[9] There is nothing in the record to support that assump-

[7] NBAA, NATA and HAI take no position on whether a Commerce Clause analysis is appropriate in this case in the first instance.

[8] *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-70 (1984); *cf. Exxon Corp.*, 437 U.S. at 126.

[9] Judge Posner made a similar assumption with respect to the Indianapolis airport in *Indianapolis Airport Authority v. American Airlines*,

tion. To the contrary, the record reflects a large and diverse general aviation population at the airport, one that presumably is more than willing to venture beyond the state line. *Northwest Airlines*, 738 F. Supp. at 1114. Similarly, it is probable that the Airport is a destination for many general aviation operations originating out-of-state.

2. Petitioners also ask the Court to assume that general aviation and the airlines compete for passengers at the Airport. Again, there is no basis in the record for this assumption. The record does show that while there are two small corporate jets based at the Airport, there are also over 160 smaller private aircraft. *Northwest Airlines*, 738 F. Supp. at 1114. These aircraft in total are capable of carrying relatively few passengers, not significantly more than a single large commercial airliner. There is no evidence of interchangeability or cross-elasticity of demand for the services offered by these disparate types of aircraft.

The existence of competition between the intrastate and interstate classes is an essential element of a Commerce Clause discrimination claim. The "economic protectionism" prohibited by the Commerce Clause is directed at "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, 112 S.Ct. at 800 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). The absence of this competitive linkage makes it impossible for the offending measure to have the purpose and effect of discrimination. Absent competitive linkage, there is also no basis for assuming that the purpose and effect of the measure is to cause passengers to use general aviation rather than commercial airlines. As a practical matter, there is no motive for the Airport to discriminate against the commercial airlines in favor of general

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Inc., 733 F.2d 1262, 1271 (7th Cir. 1984). There is no indication in that opinion as to the basis for that speculation.

aviation. *See Amerada Hess Corp. v. N.J. Taxation Division*, 490 U.S. 67, 77 (1989) (holding that a state tax did not violate the Commerce Clause on the grounds that, *inter alia*, the state did not have any motive to discriminate against out-of-state companies).

Competitive linkage, among other factors, distinguishes the cases relied upon by Petitioners. In *Bacchus Imports*, the central finding was that the locally-produced alcoholic beverages exempted from the tax were in competition with the alcoholic beverages produced out-of-state and subject to the tax. As the Court noted, "[t]he State's position that there is no competition is belied by its purported justification of the exemption in the first place." 468 U.S. at 269. In *Wyoming v. Oklahoma*, the offending measure, an Oklahoma law requiring utilities to purchase at least ten percent of their coal from in-state sources, caused the Oklahoma utilities' purchase of in-state rather than out-of-state coal to increase by nearly that amount. In *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019 (1992), the out-of-state waste haulers competed with in-state companies for the use of the same landfills.

3. Even if general aviation and the airlines were, respectively, intrastate and interstate competitors, the offending measure would not amount to actionable discrimination since there is a rational explanation for the measure other than an intent to protect in-state interests. All other factors being equal, "[a] law exhibiting the intent to impose a compensatory fee for . . . a legitimate purpose is prima facie reasonable" under the Commerce Clause. *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154, 160 (1937).

The Court found in *Evansville* that a discrepancy in charges between airlines and general aviation was reasonable. The challenged head taxes applied only to passengers departing on

large commercial airlines. They did not apply to general aviation passengers, arriving passengers, certain classes of passengers such as the military, and passengers on charters and air taxis. Thus, distinctions were made, but they did not amount to actionable discrimination because "these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." 405 U.S. at 717. Focusing specifically on general aviation, the Court stated:

> Commercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes. Commercial aviation, therefore, may be made to bear a larger share of the cost of facilities built primarily to meet its special needs, whether that additional charge is levied on a per-flight basis in the form of higher takeoff and landing fees, or as a toll per passenger-use in the form of a boarding fee. In short, distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied.

405 U.S. at 718-19.[10]

The *Evansville* reasoning aside, there are at least two other reasons for the different treatment accorded the airlines and general aviation: (a) the historic distinction between common carriers and private carriers; and (b) the demand elasticity curve for general aviation.

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[10] The discrimination alleged in this case is even less compelling than that alleged in *Evansville*. In this case, the Airport, acting consistently with the AHTA, has isolated the costs attributable to general aviation and assured the users, to the apparent satisfaction of the Petitioners (who do not contest this part of the allocation), that the airlines do not subsidize general aviation.

a. The distinction between common carriers, *i.e.*, carriage for compensation or hire, and private carriage is the common thread in all forms of transportation regulation. Under the federal scheme, general aviation, which comprises the bulk of private carriage by air, is subjected to regulatory requirements which are much less intrusive than those imposed on the airlines.[11] The point is that the federal government, in effect, discriminates between the airlines and general aviation on a daily basis with no express or implied intent to burden one vis-à-vis the other.

By subjecting general aviation to a different measure and level of fees at the Airport, the Airport is doing no more than what the federal government does — recognizing that there are substantial, if non-quantifiable, differences between the two classes of operators.

b. General aviation aircraft owners and pilots have many more airport options than airlines. Almost any airport can accept general aviation operations. However, only a relatively small number of airports are certificated to handle airline operations. While the existence of certificated airports at Lansing and Kalamazoo does provide Grand Rapids airline passengers with some alternatives, *Northwest Airlines*, 738 F. Supp at 1117, there are many more general aviation-qualified airports in the area.

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[11] *Compare* 14 C.F.R. Part 91 (operating and flight regulations applicable to general aviation) *with* 14 C.F.R. Part 121 (operating and certification regulations applicable to common carriers) and 14 C.F.R. Part 200 *et seq.* (economic regulations applicable to common carriers, including, for example, regulations regarding certificates of public convenience and necessity (Part 206), a uniform system of accounts and reports (Part 241), overbooking of flights (Part 250), smoking aboard aircraft (Part 252), domestic baggage liability (Part 254), and computer reservation systems (Part 255)).

If general aviation fees were increased at the Airport fivefold, many general aviation operations would undoubtedly move to other airports in the region.[12] If the present fuel flowage fee were increased fivefold, aviation users would be paying an additional twenty cents per gallon for fuel at the Airport, a sufficient incentive for any user to find less expensive places to refuel. To the extent that general aviation operations declined, of course, Airport revenues would be decreased. It is quite possible that the current schedule of charges for general aviation is the point at which revenues are maximized, but the Court need not engage in "complex factual inquiries about such issues as elasticity of demand" for a Commerce Clause analysis. *Commonwealth Edison Co v. Montana*, 453 U.S. 609, 619 n.8 (1981). As *Evansville* teaches, it is enough that there is an alternative rational explanation for the difference in fees. The obvious difference in the elasticity of demand between airlines and general aviation clearly provides the requisite element of rationality.

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[12] Many fee disputes involving general aviation center on fees which are raised for the purpose of forcing general aviation to use other airports. For example, in *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 161-62 (1st Cir. 1989), the airport operator imposed a fee schedule which raised general aviation fees at Boston's Logan Airport by approximately 300 percent with the intention of forcing general aviation to use reliever airports in the area.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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